Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining

the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion

that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIRST PACIFIC BANK, a California corporation, and FIRST PACIFIC BANCORP, INC., a Delaware corporation, Plaintiffs, v. JAMES E. GILLERAN, SUPERINTENDENT OF BANKS, CALIFORNIA STATE BANKING DEPARTMENT; THE FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CAPACITY AS RECEIVER OF FIRST PACIFIC BANK and DOES 2 through 25, inclusive, Defendants.	CASE NO. CV 90-6563-JGD(JRX) OPPOSITION OF DEFENDANTS JAMES E. GILLERAN SUPERINTENDENT OF BANKS AND CALIFORNIA STATE BANKING DEPARTMENT TO PLAINTIFFS' MOTION FOR ORDER GRANTING DISCOVERY DATE: April 22, 1991 TIME: 2:30 p.m. COURTROOM: 15 [Assigned to Judge Davies]

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[p. 4] The plaintiffs also argue that they are entitled to discovery in order to oppose the Superintendent's motion for summary judgment. This case is governed by state substantive law. In the State court, where this matter originated, under Cal. Code of Civ. Proc. § 437(c), the plaintiffs must first submit a sworn statement explaining to the court why specific facts essential to opposing the motion cannot be presented. The same is true in this forum under the provisions of Fed. Rules of Civ. Proc. 56 (e) and (f) which require the plaintiffs in affidavit form to:

- explain what facts are sought in relation to the issue presented in the summary judgment motion;
- explain how the facts sought are essential to opposing the motion;
- set forth the efforts that have previously been made to secure the facts;
- set forth the reasons why the facts they seek are not readily available.

In the instant case what the plaintiffs must address is their Statement of Condition from their own ledgers which state the financial condition of the bank. The Statements of Condition which are before the court in support of the defendant's summary judgment motion are *the Bank's own Statements of Condition* as created from records maintained by Bank *without* any write-downs by the Superintendent. Based on the Bank's own documentation, the Bank's contributed capital was statutorily impaired, and a criterion for the Superintendent's issuance of the Order of Taking Possession of Property and Business and Order for . . .

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